92-368

NO. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

TOMMY GUY, PETITIONER

V.

BREEKO CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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18 pp

QUESTION PRESENTED

The question presented in this case is whether petitioner's right to due process of law was violated in a workers' compensation case, when the Full Commission, upon review of a cold record, reversed the decision of the Administrative Law Judge, which necessarily contained credibility findings.

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Tommy Guy petitions for a writ of certiorari to review the judgment of the Arkansas Supreme Court in this case.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Arkansas is unreported, but is attached hereto as Appendix A.

JURISDICTION

The judgment of the Supreme Court of the State of Arkansas (App. A) was entered on July 29, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTES INVOLVED

The relevant provisions of Ark. Code Ann. § 11-9-711 (b) (4) provide that "[t]he court shall review only questions of law and may . . . reverse. . . upon any of the following grounds and no other: . . . (D) That the order or award was not supported by substantial evidence of record."

STATEMENT

This case involves a claim for workers' compensation benefits. After a hearing before an Administrative Law Judge (hereinafter ALJ), Tommy Guy was awarded a period of temporary total disability benefits through September 1990, a 20% disability rating, and vocational rehabilitation. Upon a review of the cold record, the Full Commission reversed the ALJ's decision, finding that claimant was only entitled to temporary total disability benefits through September 1989, a 7% disability rating, and no

vocational rehabilitation.

The claimant appealed the Full Commission's decision to the Supreme Court of Arkansas. In his appeal, he maintained that his right to due process of law had been violated because the Commission reversed the ALJ's decision, including credibility findings, based only upon a review of the cold record. The Arkansas Court of Appeals conceded that the question in this case went directly to the weight afforded the witnesses' testimony, and that questions regarding weight and credibility of witnesses was exclusively within the province of the Commission, and affirmed the Commission's decision. Claimant filed a request for review of that decision with the The Supreme Court of Arkansas, but the Court affirmed the Court of Appeals

REASONS FOR GRANTING THE PETITION

The basis of this Petition is to direct the Court's attention to the unfair

standard of review now presently adhered to by the Arkansas Appellate Courts relating to workers' compensation claims.

Presently, the decisions rendered by the Workers' Compensation Commission are not disturbed by an Appellate Court, even though the Appellate Court would review the evidence in a different light, if the findings of the Commission are supported by substantial evidence. See, Alcoa v. Vann, 14 Ark. App. 223, 686 S.W. 2d 812 (1985); and Clark v. Peabody Testing Service, 265 Ark. 489, 579 S.W. 2d 360 (1979).

Yet the Workers' Compensation Commission reviews the decisions of ALJs de novo. Warwick Electronics, Inc. v. Devazier, 253 Ark. 1100, 490 S.W. 2d 792 (1973). The duty of the Workers' Compensation Commission is to make a finding in accordance with a preponderance of the evidence, and not on whether there is any substantial evidence to support the

findings of the ALJ. Jones v. Scheduled Skyways, Inc., 1 Ark. App. 44, 612 S.W. 2d 333 (1981). Thus, even though the ALJ has the advantage of meeting the claimant face to face and personally hearing the testimony, the ALJ's credibility findings are of no affect. Instead the Commission is free to substitute its own findings regarding credibility of witnesses. This renders the findings of the ALJ, the only fact finder who hears and sees the witnesses, insignificant.

When a decision of the Workers' Compensation Commission is appealed to the Arkansas Court of Appeals, no weight at all is given to the findings and conclusions of the ALJ, before whom the claimant's appeared. Tyson Foods Inc. v. Disheroon, 761 S. W. 2d 617, 618 (Ark. App. 1988). And, if there is any substantial evidence to support the Commission's findings, they will be affirmed. Arkansas Power & Light Co. v.

Hooks, 295 Ark. 296, 749 S.W. 2d 291 (1988).

In the present case, Tommy Guy urged the Supreme Court of Arkansas to change the "substantial evidence" standard of review and adopt the "substantial evidence on the record as a whole" approach employed by the Eighth Circuit Court of Appeals in Gavin v. Heckler, 811 F. 2d 1195 (8th Cir. 1987). A claimant's testimony and an ALJ's credibility findings would be included as part of the "evidence on the record as a whole." The Court declined, noting that they had recently considered this precise issue in Scarbrough v. Cherokee Enterprises, 33 Ark. App. 139, 803 S.W. 2d 561 (1991), aff'd, 306 Ark. 641, 816 S.W. 2d 876 (1991).

In the Scarbrough case, the Supreme Court of Arkansas declined to change the standard of review, primarily due to the constraints of stare decisis. The Court

did note, however, that in certain circumstances where credibility is at issue, a party would be deprived of due process of law by the present standard. Specifically, the Court stated:

> "A reason which might indeed be compelling for holding that the initial fact finder's determinations of facts where credibility is at issue cannot be ignored would be that it deprives a party of due process of law. One of the **amicus curiae** has suggested that issue and has contended it is exacerbated by the partisan nature of the selection process for the members of the Commission. One member of the Commission represents employees, another represents employers, and the third is an attorney with no specified further affiliation. Ark. Code Ann. § 11-9-201 (A) (1987). Our **amicus** cites statistics which, it contends, show how the system of partisan commissioners skews the decision making process, making it something other than an impartial determination of workers' compensation claims. The due process question as it relates to credibility issues is, however, not one we can decide in this case. There is no disagreement among the ALJ, the Commission, and the Court of Appeals with respect to the factor in this case."

In her petition to the Supreme Court

of Arkansas for review of the decision of the Arkansas Court of Appeals, Mr. Guy urged the Court to decide the due process question in her case, because his case was different from the Scarbrough case. In Mr. Guy's case, even though the overwhelming weight of evidence on the record as a whole supported the ALJ's conclusion, the Commission reversed. Mr. Guy urged the Supreme Court of Arkansas to find that the Commission arbitrarily substituted its own judgment regarding the credibility of a witness as well as the finding of fact.

In its decision, the Supreme Court of Arkansas declined, stating that:

"_____"

A decision as to whether Mr. Guy continued to be totally unable to work could not be made based on medical opinion alone. For, although the medical evidence could be relied upon to establish the nature of Mr. Guy's impairment, it cannot

measure pain with mathematical precision. The claimant is the only person who knows the precise effect such impairment has on his ability to work, and the ALJ was the only factfinder to directly observe the demeanor of the claimant. Because the ALJ was the only factfinder to actually see the claimant in person, his findings as to the affect of claimant's pain on his ability to work are entitled to more weight than the findings of a Commission who never actually sees the claimant.

Tommy Guy believes that his right to due process of law has been violated. Since the credibility of his testimony was an integral part of the ALJ's decision to award additional temporary total disability benefits through September 1989, 20% disability rating, and vocational rehabilitation , the Commission should not have been allowed to overrule the ALJ's findings based only upon its cold review of the record.

PUBLISHER'S NOTE:

ORIGINAL PAGINATION IS NOT CONTINUOUS.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,

ORIGINAL SIGNED BY

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August 24, 1992.

APPENDIX A

SUPREME COURT OF ARKANSAS

TOMMY GUY	)	No. _____
	)	
Petitioner	)	Opinion Delivered
	)	_____, 1992
	)	
V.	)	
	)	
BREEKO CORPORATION	)	Petition for
	)	Review Denied
Respondent	)	

PER CURIAM

This a workers' compensation case. The Court of Appeals affirmed the decision of the Arkansas Workers' Compensation Commission that petitioner's permanent impairment equaled seven and one-half percent of the lower extremity and his healing period ended in September 1989. The Court of Appeals found substantial evidence in the record to affirm the Commission, noting that the Commission explained why it gave greater weight to the anatomical rating assigned by Dr. Carnesale than by Dr. Lopez. Dr. Carnesale's estimate was seven and

one-half percent of the lower extremity whereas Dr. Lopez's was thirty-nine percent. The reason was that Dr. Carnesale was the treating physician who also performed the surgery on petitioner's knee, whereas Dr. Lopez saw petitioner only once, and only for the purpose of evaluation.

In his petition for review petitioner points out that the Administrative Law Judge gave a rating of twenty percent and maintains that this case is thereby distinguishable from Scarbrough v. Cherokee Enterprises, 306 Ark. 641, 816 S.W. 2d 876 (1991), where we said due process was not implicated as to issues of credibility where there is no disagreement between the ALJ, the Commission and the Court of Appeals with respect to the factual issues of the case. Here, petitioner argues, unlike Scarbrough, the ALJ was reversed by the Commission. That is true, but this is not a case dependent

on an issue of credibility. The dispute simply involved conflicting medical evaluations of the percentage of a partial anatomical impairment, an opinion in which variable factors are weighed depending on the viewpoint of the particular expert. Moreover, the medical evaluations in this case were entirely in the form of written reports and depositions, no live medical testimony was presented to the ALJ.

Petition denied.